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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RONALD ALLEN SCHOEN, Defendant and Appellant.	C044808 (Super. Ct. No. 02F03015)

Defendant Ronald Allen Schoen pled no contest to one count of aggravated sexual assault on a child. In exchange for his plea, nine additional counts of aggravated sexual assault on a child, 10 counts of forcible lewd acts with a minor, and one count of forcible oral copulation were dismissed. Also dismissed was an allegation that defendant had a prior conviction for foreign object penetration of a person under age 16 by a person over age 21. The trial court sentenced defendant to 15 years to life in prison and imposed restitution fines of

$10,000 in accordance with Penal Code[1] sections 1202.4 and 1202.45. Defendant was awarded 486 days of actual custody credit and 242 days of conduct credit pursuant to section 4019.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of filing the opening brief. More than 30 days elapsed, and we received no communication from defendant.

DISCUSSION

I

The 15 Percent Limit On Presentence Credit

We sought supplemental briefing on the question whether defendant's sentence is governed by the 15 percent credit limitation for "violent felonies" set forth in section 2933.1. We conclude that the 15 percent limit on presentence conduct credit is applicable to defendant's credit.

When a prisoner is confined in county jail following arrest and prior to the imposition of sentence for a felony conviction, he or she is entitled to good time/work time credit calculated at the rate of two days for each four-day period in which he or she is confined, such that "a term of six days will be deemed to

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

have been served for every four days spent in actual custody." (§ 4019, subds. (a)(4), (b), (c), (f).)

An exception to this rule applies when the conviction is for a "violent felony" as listed in section 667.5; under those circumstances, conduct credit is limited to 15 percent of the actual period of confinement, pursuant to section 2933.1, subdivision (c).[2] Section 667.5, subdivision (c)(7) lists "[a]ny felony punishable by death or imprisonment in the state prison for life" as a "violent felony."

Defendant was convicted of aggravated sexual assault on a child under section 269, subdivision (a)(1), which is punishable by a prison term of 15 years to life. Defendant is, therefore, restricted under section 2933.1 to 15 percent conduct credit for his presentence time. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1127, 1130 [section 2933.1 applies to limit presentence credit when the punishment for the current offense is a life

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[2] Section 2933.1 provides, in relevant part, as follows: "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] . . . [¶] (c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a)."

sentence].) Thus, the trial court erred by calculating defendant's conduct credits under section 4019.[3]

A sentence which fails to properly calculate custody credits is unauthorized, and may be addressed for the first time on appeal. (See *People v. Jack* (1989) 213 Cal.App.3d 913, 915-917.) In *People v. Scott* (1994) 9 Cal.4th 331, the Supreme Court explained that "a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case," for example, where the court "violates mandatory provisions governing the length of confinement." (*Scott*, at p. 354.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*Ibid*.) In such circumstances, "[a]ppellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*Ibid*.)

In this case, the trial court's failure to calculate conduct credits pursuant to the proper mandatory statutory formula is correctable without considering factual issues presented by the record at sentencing. (Cf. *People v. Tillman* (2000) 22 Cal.4th 300, 302 [waiver doctrine applies to claims

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[3] The court's excessive award of presentence conduct credit can perhaps be traced to the probation report's mistaken recommendation to that effect.

involving the trial court's failure to properly make or articulate *discretionary* sentencing choices].) The trial court exercises no discretion when computing the number of days of conduct credit to which the defendant is entitled, but instead, applies an established formula. (*People v. Jack, supra,* 213 Cal.App.3d at p. 917; see also *People v. Sage* (1980) 26 Cal.3d 498, 509.) Thus, the People's failure to object to the error does not preclude us from correcting the unauthorized sentence.

In his supplemental brief, defendant argues that a reduction of his conduct credits to 15 percent would violate the terms of his negotiated plea. The record does not support this contention.

The negotiated agreement was the dismissal of 20 additional counts and an allegation of a prior conviction, with a *Harvey*[4] waiver. The description of the plea did not include any discussion of modification of the statutorily permissible amount of conduct credits. It did not set forth the amount of custody credits defendant would receive or the calculation formula the court would use. There is nothing in the record to suggest that the conduct credits the defendant would receive was part of defendant's agreement with the prosecution.

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[4] *People v. Harvey* (1979) 25 Cal.3d 754.

II

Incorrect Advisement By The Court

The first and only mention of defendant's entitlement to conduct credit prior to sentencing occurred during the court's preplea advisements. Before accepting defendant's plea, the trial court incorrectly advised defendant: "As a result of your plea you will be limited on your conduct credits to one-fifth." Defendant is actually limited to 15 percent. Nothing about the trial court's preplea advisement incorporated a modification of defendant's entitlement to conduct credits into the parties' plea agreement. (Cf. *In re Moser* (1993) 6 Cal.4th 342, 353-356.) Application of the credit limitation in section 2933.1 is statutorily mandated and defendant has provided no persuasive authority that it is a permissible subject of plea negotiations. (*Id.* at p. 357.) Thus, application of the credit limitation in section 2933.1 would not constitute a violation of the parties' plea agreement.

At most, the trial court committed *Bunnell* error, in that it failed to properly advise defendant of "the direct consequences of conviction such as the permissible range of punishment provided by statute." (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see also *In re Moser, supra,* 6 Cal.4th 342 at pp. 351-353.) Even assuming such error, defendant is not entitled to relief based on the trial court's misadvisement unless he establishes that he was prejudiced by the misadvisement, i.e., that he would not have entered the plea

had the trial court given the proper advisement. (*In re Moser*, at p. 352.)

Defendant has made no argument nor pointed to anything in the record to suggest that entitlement to at least 20 percent presentence conduct credit was material to his decision to enter his plea. In fact, it is clear from the record that, as defendant's trial counsel explained, defendant entered his plea "[b]ecause of the enormity of the sentence he [was] facing if convicted of the case." Defendant faced an additional nine counts for aggravated sexual assault on a child, each carrying sentences of 15 years to life, 10 counts for forcible lewd acts with a minor (§ 288, subd. (b)(1)) and one count for forcible oral copulation (§ 288a, subd. (c)(2)), each carrying upper terms of eight years, and a five year enhancement for his prior conviction. Having shaved hundreds of years off of his sentence, it is unreasonable to suppose defendant would not have entered his plea had he been properly advised that he would be limited to 15 percent, not 20 percent, of his presentence conduct credit -- a difference of a mere 25 days.

We conclude the trial court erroneously calculated conduct credit under section 4019. Defendant's conduct credit is limited to 15 percent under section 2933.1. We will modify the judgment accordingly.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to provide 72 days of conduct credit pursuant to section 2933.1 for a total of 558 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P.J.

DAVIS, J.